Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LOUIS CANTOR,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD A. GREENBERG
Counsel of Record
KARL E. PFLANZ
NEWMAN SCHWARTZ & GREENBERG
950 Third Avenue
New York, New York 10022
(212) 308-7900

Attorneys for Petitioner

11pp

QUESTIONS PRESENTED

1. Does 18 U.S.C. §666(a)(2) exceed Congress's spending power or violate fundamental principles of federalism inherent in the Tenth Amendment and the structure of the Constitution as a whole when applied to completely local conduct that has no effect on any federal funds or any federal program?

2. Where contractors make payoffs to a corrupt public official in response to his extortionate threats to withhold payment of legitimately owed and concededly long overdue contract balances, and therefore the subject matter of the payoffs, as opposed to the payoffs themselves, constitutes "bona fide compensation," is a prosecution for bribery under 18 U.S.C. §666(a)(2) precluded by 18 U.S.C. §666(c)?

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OPINIONS BELOW

The unpublished order of the United States Court of Appeals for the Second Circuit affirming petitioner's conviction is reported as United States v. Cantor, No. 96-1693, 1998 WL 74852, 1998 U.S. App. LEXIS 2725 (2d Cir. Feb. 20, 1998), and is annexed hereto as Appendix A.

The order of the United States District Court for the Southern District of New York denying petitioner's posttrial motions is reported as United States v. Cantor, No. S2 94 Cr. 465 (LLS), 1996 WL 537665, 1996 U.S. Dist. LEXIS 13832 (S.D.N.Y. Sept. 23, 1996), and is annexed hereto as Appendix C.

The order of the United States District Court for the Southern District of New York denying petitioner's pretrial motions is reported as United States v. Cantor, 897 F. Supp. 110 (S.D.N.Y. 1995), and is annexed hereto as Appendix D.

JURISDICTION

The judgment and order of the Court of Appeals sought to be reviewed was entered on February 20, 1998. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case.

United States Constitution, Article I, Section 8:

> The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States.

United States Constitution, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

18 U.S.C. §666:

> [see Appendix E].

STATEMENT OF THE CASE

Petitioner Louis Cantor, the 73-year-old named partner in New York City's premier construction law firm (Max E. Greenberg, Cantor, Trager & Toplitz) whom the government described as "the foremost construction lawyer" and "one of the best litigators" in New York, was indicted in 1994. A later superseding indictment charged him with three counts of conspiring to bribe an agent of a federally funded agency in violation of 18 U.S.C. §666, and three corresponding substantive §666 counts, one set for each of three Cantor clients: Manshul Construction Company ("Manshul"), Caristo Construction Corporation ("Caristo") and Gallery Elevator Company ("Gallery"). The purported basis for subject matter jurisdiction in the district court was 18 U.S.C. §3231.

The Manshul and Caristo counts charged Cantor with conspiring with, and aiding and abetting, his clients to make payments to Sheldon Rosenblum, a corrupt lawyer employed as Deputy General Counsel by the New York City Board of Education ("BOE"), an agency that received federal funds, for the purpose of obtaining disbursements to Cantor's clients of outstanding contract balances the BOE owed them for construction projects completed many years earlier. The government conceded that these contract balances were long overdue. The payments to Rosenblum were not made for the purpose of influencing the amount of money any of Cantor's clients would receive from the BOE, but only to eliminate the roadblocks Rosenblum threatened to erect in the absence of a payoff, which would have prevented the companies (and their elderly principals) from receiving any payment on the contracts.

The Gallery counts alleged a payment to Rosenblum in exchange for his influencing the BOE to partially reinstate an award to Gallery of an elevator maintenance contract or to permit Gallery to bid on future public contracts. The payment was made in response to a threat by Rosenblum and other BOE employees that Gallery, which had legitimately submitted the low bid on the elevator contract, would not only have the contract taken away from it without good cause, but would arbitrarily be barred from bidding on public contracts for up to five years and would effectively be put out of business.

The indictment resulted from a more than three-year investigation into corruption in the New York City Board of Education's school construction program. The BOE's school construction program was funded entirely with state and local tax dollars. There was evidence at trial that the BOE had received far more than $10,000 in federal aid during each fiscal year from July1980 through June 1994. See 18 U.S.C. §666(b). The same evidence showed, however, that the BOE's federal funding was earmarked for programs such as free and reduced price lunches, bilingual instruction, and special education for handicapped and disadvantaged students; none of it was designated for school construction or maintenance. There was no evidence that any department or division within the BOE that was in charge of school buildings or construction contracts received any federal aid or administered any federal funds. The construction and maintenance of school buildings, the only aspect of the BOE's business involved in this case, was funded exclusively by New York City and by grants from the State of New York.

The government's investigation was triggered largely by Rosenblum's history of corrupt conduct in his position as

counsel to the Chancellor of the BOE. Upon his arrest in 1991, Rosenblum entered into a plea and cooperation agreement with the government, pursuant to which he pled guilty to a RICO conspiracy based, *inter alia*, on bribery predicates, in exchange for his cooperation. Throughout the investigation, the government allowed Rosenblum to remain in place as a high-ranking BOE lawyer without the knowledge or permission of his employer-client (the BOE), or state disciplinary authorities who regulate the conduct of attorneys, so long as Rosenblum continued to ensnare others, including Cantor, and make cases.

In 1991, when Cantor submitted a legitimate claim to the New York City Comptroller's Office on behalf of Manshul for payment of 25 outstanding contract balances valued at some $2 million, the Comptroller's Office transmitted the claim to the BOE because it was the BOE's obligation to evaluate the claim and determine the final amount to be paid under the contracts. The claim was directed to Rosenblum, who soon made it clear to Cantor that neither Manshul nor Cantor's other clients would ever receive fair treatment from the BOE or obtain the payments to which they were plainly entitled unless Rosenblum was paid off. Rosenblum told Cantor that he (Rosenblum) was in charge of setting up a committee of BOE engineers to evaluate the BOE's many overdue contract balances. While Rosenblum would not be involved in that evaluation process, he claimed to have the ability to prevent Manshul's claims from ever reaching the committee in the first instance, and threatened to cause extensive delays in any lawsuit Manshul might bring, thus ensuring that Julius Schulman, Manshul's ailing, 89-year-old principal, would never collect the large contract balances the BOE had long owed his company.

With respect to Caristo, no committee evaluation was necessary; the only impediment to payment of the contract balance was the submission of certain documentation. The required documents were already in the BOE's possession, but Rosenblum refused to locate the documents or turn them over to the department in charge of disbursing the payment to Caristo unless he was paid off, even though the $80,000 contract balance was needed to support the elderly widow of the company's founder.

Cantor's clients ultimately made arrangements to pay Rosenblum, and did pay him, but no payment was made for the purpose of influencing a decision to award a BOE contract to a Cantor client in the first instance or affecting the amount the client would be paid on a BOE contract. Rather, in the cases of Manshul and Caristo, Rosenblum was being paid only to do what was required of the BOE, *i.e.*, to initiate (and refrain from obstructing) the long-delayed process through which the BOE was to calculate the final amount to be disbursed on outstanding construction contracts. The amounts eventually paid to Manshul and Caristo were legitimately determined through normal evaluation processes, independent of Rosenblum. Indeed, the government conceded at trial that Manshul and Caristo were fully entitled to the payments they received from the BOE. In the case of Gallery, Rosenblum was paid to help ameliorate the BOE's actions against Gallery (arbitrarily taking away a contract already awarded to Gallery and barring the company from bidding on any public contract for up to five years), which Rosenblum himself described as unjustifiable, "stupid" and politically motivated.

Cantor's trial before Judge Louis L. Stanton and a jury began in April 1996. The government's theory of the case,

reflected in its opening and summation, was that Cantor's clients, aided by Cantor, paid Rosenblum to receive expedited or preferential treatment from the BOE rather than "using the legal procedures that were available." Cantor's defense was that he did not act "corruptly" because Rosenblum extorted the payments by thinly veiled threats that, unless they paid Rosenblum, Cantor's clients would never obtain what was owed to them by the BOE. Thus, as Judge Stanton characterized the defense during the trial, Cantor's clients paid Rosenblum to "expedite" BOE payments "from never to sometime."

After three days of deliberations and an Allen charge, the jury returned a guilty verdict on all counts, followed by expressions of remorse from several jurors who, too late, wanted to change their verdict. Upon sentencing Cantor to probation, however, Judge Stanton made the following findings:

> First, the purposes of the bribes were not to facilitate the commission of a crime or to obtain a license to which the recipient was not entitled. They were to obtain payment of moneys *legitimately due to the claimants* [Cantor's clients] and long withheld in what one witness described as "a 15-year mess" left by the Board of Education for lack of effort in closing out its contract obligations.
>
> * * *
>
> Rosenblum said there was too little money to satisfy all [BOE] obligations, that only those at the head of the list would be paid, that litigation would be delayed for five

> or six years, and then appealed [by the BOE], if lost, and that the claimant could work with Rosenblum or fight with the [BOE].
>
> In view of [Cantor's] client Julius Shulman's advanced age and Mrs. Caristo's situation, 85 years old and running out of funds, those arguments were powerful. *Rosenblum understood[] [h]e was extorting the bribes*. There was testimony he pleaded guilty to extortion. Under New York's penal code, [§200.05], it is a defense to a bribery prosecution that the corrupt public servant obtained the bribe by means of extortion.

Appendix B at B17-B18 (emphasis added).

On the Judgment form, the district court explained its downward departure from the Sentencing Guidelines by succinctly reiterating:

> Purpose of bribes was to obtain payments to which payor was legally entitled, defendant neither paid nor shared in benefits of the bribes, and the bribes were extorted by the corrupt official.

Cantor was sentenced to three years' probation, including five months' home detention, a $40,000 fine and a $300 special assessment.

The district court denied Cantor's motions in which he argued, *inter alia*, that 18 U.S.C. §666, as applied in this case, exceeded Congress's spending power and violated

fundamental principles of federalism. Appendix D at D5. Despite its subsequent findings that the subject matter of the alleged bribes was money to which Cantor's clients were legally entitled and that the payments they made to obtain that money were extorted from them by Rosenblum, the district court also rejected Cantor's arguments that the "bona fide compensation" exception set forth in §666(c) precluded his conviction. Appendix C at C2. On appeal, the United States Court of Appeals for the Second Circuit affirmed Cantor's conviction, holding, *inter alia*, that Cantor's constitutional challenge to the application of §666 was foreclosed by this Court's decision in Salinas v. United States, ___ U.S. ___, 118 S. Ct. 469 (1997), and rejecting without discussion Cantor's argument addressed to §666(c). Appendix A at A5 & n.5, A6.

REASONS FOR GRANTING THE WRIT

I.

In Salinas v. United States, ___ U.S. ___, 118 S. Ct. 469 (1997), this Court not only construed 18 U.S.C. §666 for the first time, but for the first time considered a constitutional challenge to a criminal statute enacted pursuant to Congress's spending power. See U.S. Const. art. I, §8. Naturally, the Court approached this new statute and new area of constitutional interpretation with extreme caution, implicitly limiting its holding to the facts of the case, and leaving open more questions than it answered.

Here, the charged conduct, unlike that in Salinas, had no effect whatsoever on any federal program. Therefore, this case truly tests the limits of Congress's constitutional power.

The Court's determination that the application of §666 to the facts of Salinas did not offend the Constitution was very narrow, and was made despite "[w]hatever might be said about §666(a)(1)(B)'s application in other cases." 118 S. Ct. at 475. The Court was careful to point out that the case involved a federal prisoner bribing his jailor, the sheriff in charge of a jail built with federal funds for the purpose of housing federal prisoners like the defendant pursuant to a series of contracts with the federal government. Thus, the Court explained, the exercise of federal power was appropriate because "[t]he preferential treatment accorded to [the prisoner] was a threat to the integrity and proper operation of the federal program." Id.

In Salinas, this Court left no doubt that it would have serious reservations about the reach of §666 in another case where the federal interest was not as clear. This is that case.

As in Salinas, the conduct alleged in this case had no effect on federal funds. But unlike the bribe payments in Salinas, the payments to Rosenblum in this case also did not have the slightest impact on the integrity or proper operation of any federal program. There was simply no federal program, or any other basis for an exercise of federal spending power, anywhere in sight. Cantor was prosecuted in federal court under §666, instead of in state court – where, as the district court recognized, he would have had a complete defense to a bribery charge (see N.Y. Penal Law §200.05) – only because the behemoth BOE, which employed a corrupt lawyer as the head of the office that oversaw the construction of school buildings, also happened to have other departments that received funding pursuant to unrelated federal education programs.

Having determined that the Spending Clause permits a federal prosecution where the charged conduct has no direct impact on federal funds but does affect the operation of a federal program, the Court now has the opportunity to decide a case which represents the next logical step in the constitutional analysis. The question in this case is whether a criminal conviction can be sustained under the Spending Clause where the charged conduct involves neither federal funds nor a federal program, but does involve a large agency some part of which receives federal aid for unrelated purposes.

The burgeoning federalization of the criminal law that has occurred in recent years has been accomplished primarily

through laws which use the Commerce Clause as a "jurisdictional hook." Schmuck v. United States, 489 U.S. 705, 722-23 (1989) (Scalia, J., dissenting). This Court has checked this trend somewhat by delineating the limits of Congress's ability to rely on the Commerce Clause in enacting criminal statutes. United States v. Lopez, 514 U.S. 549 (1995). In doing so, the Court has made clear that the Commerce Clause cannot be interpreted so expansively as to swallow the rest of the Constitution. See U.S. Const. amend. X.

Now that §666 is being used more frequently and broadly,[1] the limits of the Spending Clause require similar definition. The expenditure of federal funds reaches just as deeply into every corner of American society as does interstate commerce. Just as reliance on the commerce power, without any meaningful link between the prohibited conduct and interstate commerce, "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States" (Lopez, 514 U.S. at 567), Congress's exercise of its spending power, without any requirement of a connection between the conduct subject to prosecution and a federal interest such as the integrity of federal funds or a federal program, would leave virtually nothing to be regulated by the States. Thus,

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1. Many prosecutors consider §666 an all-purpose "tool available to combat local political corruption" (Twardy & Curran, "Foley: Short-Lived Respite for Corrupt Public Officials?" New York Law Journal, Apr. 30, 1997, p. 1, col. 1), rather than a statute that "extends only to a very specific federal interest, namely, safeguarding the integrity of federal funds that are intended to serve legislatively defined policy objectives." United States v. Foley, 73 F.3d 484, 490 (2d Cir. 1996).

where Congress relies on the Spending Clause to enact criminal legislation, as it did in enacting §666, there must be, in some form and in some degree, a requirement of a link between the conduct Congress seeks to prohibit and a legitimate federal interest related to the spending of federal funds.

Even where the spending power has been used merely to impose conditions on States, and not to punish conduct criminally, this Court has held that there must be some relationship between the legislation and the purpose of the federal spending; "otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." New York v. United States, 505 U.S. 144, 167 (1992). While this Court has set forth a test for determining whether Congress's imposition of requirements upon States as conditions of federal funding is permissible under the Spending Clause (see South Dakota v. Dole, 483 U.S. 203 (1987)), no such test exists for determining whether the application of a criminal statute is permissible under the Spending Clause. The facts of this case would allow the Court to formulate such a test. See U.S. Sup. Ct. Rule 10(c).

A further question presented by this case is whether, aside from exceeding Congress's spending power, the application of §666 in this case intruded so deeply into matters of such local concern with so little justification that it violated principles of federalism protected by the Tenth Amendment and inherent in the "essential postulates" of the Constitution's structure, wholly apart from any particular textual language. See Printz v. United States, ___ U.S. ___, 117 S. Ct. 2365, 2376-79 (1997) (federal statute requiring local law enforcement officers to conduct background checks

on purchasers of firearms violated principles of federalism inherent in the Constitution even though regulating the sale of firearms is within Congress's Commerce Clause power).[2] Federalism principles are "reflected throughout the Constitution's text," not just in the Tenth Amendment, and the exercise of otherwise legitimate federal power in a manner that interferes with state sovereignty is unconstitutional. Printz, 117 S. Ct. at 2376, 2379 & fn 13. This Court has recognized that the States "historically have been sovereign" in the areas of criminal law enforcement and the management of public education (Lopez, 514 U.S. at 564), precisely the two areas involved in this case. The question presented is whether the federal government unjustifiably invades that sovereignty when it invokes a criminal statute that permits prosecution not only for entirely local conduct, but conduct that does not implicate any federal funds or federal program.

Cantor's constitutional challenges in this case present important questions of first impression. They concern some

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2. See also Fry v. United States, 421 U.S. 542, 547 n.7 (1975) ("Petitioners have stated their argument, not in terms of the Commerce power, but in terms of the limitations on that power imposed by the Tenth Amendment. . . . Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system"); Veazie Bank v. Fenno, 75 U.S. 533, 541 (1869) ("There are, indeed, certain virtual limitations [on the taxing power], arising from the principles of the Constitution itself. It would, undoubtedly, be an abuse of power if so exercised as to impair the separate existence and independent self-government of the States, *or* if exercised for ends inconsistent with the limited grants of power in the Constitution") (emphasis added) (citation omitted); Tribe, American Constitutional Law (2d ed. 1988), §5-20, pp. 378-85.

of the most fundamental subjects of constitutional adjudication, including the limits of the powers granted to Congress in Article I and the relationship between the federal government and the States. This Court has had the opportunity to consider these issues only once before, and then only glancingly. Because §666 reaches so far into local affairs and potentially into the life of virtually every American citizen, it is important that this Court settle the issues raised by this case concerning the permissible scope of the statute. Accordingly, pursuant to U.S. Supreme Court Rule 10(c), the Court should grant the writ of certiorari.

II.

The statute under which Cantor was convicted contains a broad and significant exemption from its reach:

> This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

18 U.S.C. §666(c). Rather than defining a particular term or describing a certain type of conduct, subsection (c) simply lists various kinds of monetary transfers, and declares that §666 "does not apply" to them.

In this case, Cantor argued that the underlying "business, transaction, or series of transactions" (18 U.S.C. §666(a)(2)) in connection with which the alleged bribe payments were made – *i.e.*, legitimate contract balances concededly owed to Cantor's clients – consisted of "bona fide . . . fees . . . compensation . . . or expenses paid . . . in the usual course of business," and that subsection (c) therefore excluded his conduct from the reach of the statute. The government responded by arguing that subsection (c) is applicable only when the alleged bribe payment itself is a "bona fide" payment as described in that subsection.

The lower courts have received no guidance as to which of these interpretations of subsection (c) is correct. Some courts have, without discussion, looked to the underlying transaction to determine whether the "bona fide compensation" exemption applies. For example, in United States v. Harloff, 815 F. Supp. 618 (W.D.N.Y. 1993), the court applied subsection (c) to the benefits defendants

obtained by virtue of their misconduct. The court found that subsection (c) precluded the §666 prosecution of a group of police officers who allegedly falsified payroll records by claiming to have worked 40-hour weeks when in fact that had worked substantially fewer hours. The Sixth Circuit, in United States v. Valentine, 63 F.3d 459, 465 (6th Cir. 1995), distinguished Harloff but expressed agreement with its holding. Cf. United States v. Grubb, 11 F.3d 426, 434 (4th Cir. 1993) (court holds subsection (c) is inapplicable in case where defendant arranged for friend to receive government job in exchange for $10,000 political contribution, not because the subject matter of the bribe – the wages received by the briber – was not within the scope of subsection (c), but because the wages were not "bona fide").

At least one other court has assumed that subsection (c) can apply either to the transaction or sum that is the object of the bribe or to the bribe payment itself. In the §666 case later decided by this Court, the Fifth Circuit suggested that the defendants would have been exempted from prosecution under §666 had "the money they received from [the bribe payor] *or the benefit that [the bribe payor] received from them* [been] 'bona fide' and 'in the usual course of business.'" United States v. Marmolejo, 89 F.3d 1185, 1190 n.5 (5th Cir. 1996) (emphasis added), aff'd on other grounds sub nom. Salinas v. United States, ___ U.S. ___, 118 S. Ct. 469 (1997). Indeed, subsection (c) has even been applied to the federal funding received by the covered agency. United States v. Nichols, 40 F.3d 999, 1000 (9th Cir. 1994).

No court has expressly adopted the interpretation urged by the government and implicitly approved by the Second Circuit in this case, *i.e.*, that subsection (c) applies only to the bribe payment itself. There are good reasons for

this lack of authority. If subsection (c) were limited to the thing of value given as a bribe, it would be superfluous, since a bona fide payment of wages, compensation or the like will virtually always fail to satisfy the statutory requirement that the thing of value be given "corruptly." 18 U.S.C. §666(a)(2). Such an interpretation would render subsection (c) meaningless for another reason as well. Subsection (c) provides an exemption from §666 as a whole, including §666(a)(1)(A), which prohibits embezzling, stealing, obtaining by fraud, converting or misapplying the property of a federally funded agency. If subsection (c) is to apply to §666(a)(1)(A), it can only be concerned with the property that is the object of the wrongdoing, since there is no other quantifiable item mentioned in subparagraph (a)(1)(A). See Harloff, 815 F. Supp. at 618-19 (applying subsection (c) in prosecution under 18 U.S.C. § 666(a)(1)(A)).

Thus, the conclusion that subsection (c) precludes a prosecution where the underlying transaction involves bona fide compensation paid in the usual course of business is, at the very least, a reasonable interpretation of the plain language of the statute. Moreover, Cantor's reading of subsection (c) is consistent with §666's overall design to protect the integrity of federally funded programs. Id. at 619.[3]

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3. To the extent that subsection (c) is ambiguous as to which sum of money must be bona fide in order for a §666 prosecution to be barred, the rule of lenity requires that Cantor's interpretation be adopted, since the government's interpretation would "alter[] the existing balance of state and federal powers" (Salinas, 118 S. Ct. at 474) by subjecting bribery-related conduct, normally punishable only under the police power possessed

(continued...)

Still, in view of the statute's imprecise wording and the lack of an authoritative judicial analysis as to which "bona fide" payments subsection (c) is meant to exempt from the statute's reach, the issue is not free from doubt. Subsection (c) is a significant exemption to a criminal statute with serious consequences (10 years' imprisonment is authorized) which is being used with increasing frequency by federal prosecutors, and the lower courts need to be guided on how to apply the ambiguous language of the exemption. Thus, the interpretation of subsection (c) is an important and unsettled question of federal law, deserving of this Court's attention. U.S. Sup. Ct. Rule 10(c). The Court should accept this opportunity to resolve the issue, before confusion over the meaning of subsection (c) leads to further uneven, unintended and unjust results.

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3. (...continued)
exclusively by the States, to federal jurisdiction. See Lopez, 514 U.S. at 561 n.3 ("When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction'") (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

RICHARD A. GREENBERG
Counsel of Record
KARL E. PFLANZ
NEWMAN SCHWARTZ & GREENBERG
950 Third Avenue
New York, New York 10022
(212) 308-7900
Attorneys for Petitioner

New York, New York
May 19, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of February, one thousand nine hundred and ninety-eight.

PRESENT: HON. JOHN M. WALKER, Jr.,
HON. GUIDO CALABRESI,
HON. DONALD P. LAY,*
Circuit Judges.

UNITED STATES OF AMERICA, *Appellee*,

v. SUMMARY ORDER
96-1693

LOUIS CANTOR, *Defendant-Appellant.*

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*. The Honorable Donald P. Lay, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appearing For Appellant: RICHARD A. GREENBERG,
New York, NY.

Appearing For Appellee: ANDREW S. DEMBER,
Assistant United States Attorney,
New York, NY.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Louis L. Stanton, *Judge*) and was argued.

UPON CONSIDERATION WHEREOF, it is ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Appellant, an attorney, was convicted on various counts for bribing and conspiracy to bribe an official of a state agency that receives federal funds. *See* 18 U.S.C. §§371, 666. He recommended and arranged to have his clients in the construction industry bribe Sheldon Rosenblum, the Chief of the Commercial Division in the Office of Legal Services at the New York City Board of Education ("BOE"), in order to expedite the disbursement of "retainage" payments owed to them by the BOE.[1] Appellant raises several objections to his conviction; none have merit.

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1. The practice of the BOE was to hold back a percentage of the amount due on construction contracts as "retainage." This amount was not to be paid until completion of the project to the BOE's satisfaction. Illegal withholding of retainage payments by the BOE was apparently widespread. Appellant was convicted in a "sting" operation that was cracking down on corruption within the BOE.

First, appellant contends that the bribes that involved the School Construction Authority ("SCA")[2] – the "Caristo" counts – are not covered by §666 because that entity, unlike the BOE, does not directly receive federal assistance.[3] The government responds that all the contracts that were originally made with the BOE (and later transferred to the SCA when that entity was created) "remain" contracts of the BOE. We need not, however, resolve the question of whether *all* such contracts continued to be contracts of the BOE, or whether some became new contracts with the new agency. For our purposes, we only need to look at the specific terms of the agreement involved in the Caristo bribes: Under that agreement, the BOE remained the named party on the contract, and, if Caristo could not prove his entitlement to the retainage, it was the BOE that would get the money in dispute. It follows that the Caristo contracts did remain, at least to some extent, the "business" of the BOE, *see* 18 U.S.C. §666(a)(2), and therefore, that the bribes – made to the BOE's attorney (Rosenblum) – concerned an entity that directly receives federal funds.

The next argument is that the government, while it clearly showed that the bribes involved $5,000 or more (as required by §666), failed to prove that this was the value of the transaction from the perspective of the state agency that

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2. In 1988, the state legislature created the SCA to oversee the construction and renovation of schools. Some, but apparently not all, of the BOE's existing construction contracts (and associated funds) were transferred to the SCA at that time.

3. The argument that the BOE itself is not a qualifying agency under §666 is frivolous.

received the federal funding. And the law of our circuit requires that the value involved be viewed from the standpoint of the affected agency. *See United States v. Foley*, 73 F.3d 484, 488-92 (2d Cir.1996). Despite appellant's earnest arguments, the *Foley* requirement has easily been met, and appellant's contentions to the contrary are all without merit.[4]

More plausible is a further argument based on *Foley* – that the government failed to *allege* that the bribe involved $5,000 from the perspective of the agency. This omission, appellant asserts, constituted a fatal failure to indict on a material element of the offense. In the end, this contention also fails.

It is well settled that "[a]n indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir.1992). Appellant's argument is that because the perspective of the bribe's valuation is characterized as being an implicit but "material" element of the offense in *Foley*, *see* 73 F.3d at 488, the failure of the indictment to mention this specific point is reversible error. But *Foley* was decided on the ground that the government failed to meet its burden of proof at trial on this issue, and it is by no means clear whether the court's comments on indictments are part of (or, indeed, could be part of) its holding.

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4. For example, appellant's assertion that the BOE's "unjustified" interest in retaining the funds precludes it from attaching *any* pecuniary value to those funds is fanciful.

We need not resolve this issue, however, because appellant did not challenge the alleged defect in the indictment at his trial, and, as a result, did not preserve this matter for appellate review. *See, e.g., United States v. Gironda*, 758 F.2d 1201, 1210 (7th Cir.1985) ("[A]n indictment not challenged before trial will be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted.") (internal quotation marks and citations omitted). This rule makes sense because it prevents defendants from holding faulty indictments as aces up their sleeves, to be played only in the event of guilty verdicts. The indictment before us closely followed the statutory language of §666. Under the circumstances, we cannot say that the indictment's omission of the agency-perspective element with respect to the $5,000 valuation deprived Cantor of fair notice of the crimes against which he would have to defend himself. *See United States v. Silverman*, 430 F.2d 106, 111 ("An indictment must be read to include facts which are necessarily implied by the specific allegations made."), *modified* 439 F.2d 1198 (2d Cir.1970).

The third claim made by appellant is that §666 requires that the bribe directly involve the federal funds received by the state agency, or, in the alternative, if such a requirement does not exist, that §666 violates the Tenth Amendment. The Supreme Court has just rejected this position. *See Salinas v. United States*, 118 S.Ct. 469, 474 (1997).[5] Consequently, so do we.

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5. There is a passage in the Court's opinion that suggests that some nexus between the bribe and the federal funds at stake might be needed. *See Salinas* at 474

(continued...)

Appellant's other principal claims – that the evidence was insufficient to establish that Cantor acted "corruptly" under §666, that the government's investigative techniques violated the Due Process Clause, and that the district court abused its discretion in not suppressing certain evidence – are all without merit.

We have reviewed the full record before us and find no error in the proceedings below. The judgment of the district court is AFFIRMED.

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5. (...continued)
(describing the relationship to federal funds in the case before it as "close enough to satisfy whatever connection the statute might require"). The case before us similarly satisfies whatever connection is mandated. *See United States v. Bonito*, 57 F.3d 167, 172 (2d Cir.1995).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

v. 94 CR 465 (LLS)

LOUIS CANTOR,

Defendant.
----------x

October 22, 1996
10:00 a.m.

Before:

HON. LOUIS L. STANTON,
District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
SUZANNE JAFFE BLOOM
ANDREW DEMBER
Assistant United States Attorneys

NEWMAN & SCHWARTZ
Attorneys for Defendant
BY: GUSTAVE H. NEWMAN
KARL E. PFLANZ

(Case called)

(In open court)

THE COURT: Good morning. I assume you have been over the presentence report with Mr. Cantor.

MR. NEWMAN: Yes, I have, sir.

THE COURT: I see from the copy that I have that you have various changes you would like to see made. They are fairly extensive. They stem from the fact that the version in the presentence report of the offenses is basically the prosecution version. And to that you have appended basically the defense version.

MR. NEWMAN: That's correct, sir.

THE COURT: It seems to me the thing for me to do is leave it as it is. None of the factual statements recited in the presentence report have anything to do with the case. I tried the case, I have my own impression. I have been over the record thoroughly in the past few days and I do not think any purpose can be served by making specific findings, unless somebody requires something different.

MR. NEWMAN: I don't require any specific findings, Judge.

THE COURT: Then let's turn to the guideline calculation. Since, under the cases, even if a departure is made – and, of course, I am considering a departure, both sides have briefed it fully – it must be made from a defined point. The guideline calculation starts at base level 10, adds

two levels for more than one bribe, adds four levels for a payment of $39,000. That is specifically challenged by the defense, but on that point I rule against them. And those then total level 16. I think that brings us to the issue of whether a two-level reduction should be granted for minimum role.

Does either side wish to add anything to what they have submitted on that issue in writing?

MR. DEMBER: No, your Honor.

MR. NEWMAN: No, your Honor.

THE COURT: Then I will resolve that issue forthwith.

The Sentencing Guidelines Section 3B1.2, application note 3, states: "A minor participant means any participant who is less culpable than most other participants but whose role could not be described as minimal."

This accurately describes Mr. Cantor's role. There is no serious argument that it was minimal; it was not minimal. But he was not the one who paid a bribe. He was not the one for whose benefit the bribes were paid. Those participants who paid the bribes for their benefit were more culpable than he. Canror tried, more or less successfully, at different times, to distance himself from the discussions and payments of the bribes. He made the introductions, but he was a minor participant, not a principal.

Accordingly, I determine that the two-level reduction for minor role should be allowed and the guideline level is level 14, which yields a sentencing range of 15 to 21 months.

With that said, there is the issue of a downward departure.

Mr. Newman, you can proceed as you wish on that, or you may prefer to argue it and have it determined before any more general comments about sentencing or as part of one overall presentation. How would you like to go?

MR NEWMAN: Judge, it's so intertwined in my presentation that I might as well make the presentation, Judge.

THE COURT: Okay. Then before you start, Mr. Newman –

Mr. Cantor, let me say to you that if you wish to speak before Mr. Newman speaks, now is your chance. If you want you can wait and speak after he speaks. You do have to say anything at all, it is entirely up to you. But if you want to speak first, then now is the time.

THE DEFENDANT: Thank you, your Honor. I think I put everything I have to say in my letter to you.

THE COURT: All right. Thank you.

I should say for the record that I have received, in addition to the presentence report itself and its various addenda and versions, Mr. Newman's letter of August 27 with Dr. Rubinstein's advice; your sentencing memorandum, Mr. Newman, and the great number of letters appended to it, all of which I have read; the government's letter of October 17, really responding to the defense letter, and its attachment,

dated October 10, from the Bureau of Prisons; and your letter dated October 10, Mr. Cantor.

Is there anything that might be on its way to me that I have not seen?

MR. NEWMAN: No. We had mercy in mind, Judge, and so we prepared no further writings.

THE COURT: Then I think you have the floor, Mr. Newman.

MR. NEWMAN: Judge Stanton, since the advent of the guidelines, we as advocates have all focused on the question of what's the point total, as we just did, what, if any, basis is there for a downward departure. And as advocates we have sometimes lost sight of the basic principle, and that is, your Honor, the statute that actually created the Sentencing Commission, set forth its policy and indicated Congress' attitude toward the sentencing commission and sentencing generally.

I have particular reference, your Honor, to Title 28, Section 994, subdivision 5(j)

THE COURT Title 28?

MR. NEWMAN: Yes, sir.

THE COURT: 18.

MR. NEWMAN: Sir, Title 28, Section 994, the Judiciary and Judicial Procedure Act, Judge, Section 994, subparagraph 5(j).

I take the liberty, your Honor, to read it because I think that is the backdrop against which I want the Court, respectfully, to view Mr. Cantor, his prior life, and his conduct in this particular case. And I take the liberty of reading it –

Are you with me, Mr. Dember?

MR. DEMBER: Go ahead.

MR NEWMAN: "The commission shall ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender, has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury."

Obviously, Mr Cantor's crime does not fall into the second category. I'm not demeaning or diminishing the seriousness, but what I'm saying is that the basic principle of nonincarceration for nonviolent first offenders is sometimes lost in our concentration on the guidelines, the boxes in the guidelines, if you will, and the particular delineated sentences in the guidelines.

With that as a backdrop, what I'd like to do is reason with this Court in determining what is the appropriate sentence for a nonviolent first offender, 75-year-old attorney.

Certainly there can be no argument that Mr. Cantor is 75 years of age. Certainly there can be no argument that Mr. Cantor suffers from a very, very serious series of physical

ailments. As Exhibit A of our sentencing memorandum indicates, the letter from Dr. Rubinstein clearly indicates, without contradiction, that aside from his very serious heart condition, a number of other of his major organs, such as his kidneys, his prostate, have become affected.

Under 5Hl.l of the Sentencing Guidelines, the policy statement indicates clearly, while age is not ordinarily a factor, age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirmed and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

This same principle, your Honor, is repeated in a separate section of the guidelines when we turn to 5H1.4, which reads almost in haec verba: "However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range, e.g., in the case of a seriously infirmed defendant, home detention may be as efficient and less costly than imprisonment."

In this case, the realistic likelihood that Cantor, at age 75, with the infirmities and conditions I have just alluded to and Dr. Rubinstein has spelled out in much greater detail in his letter, the real likelihood, indeed almost the fact, is that Cantor, after almost 50 years of bracing the profession as a lawyer, will lose his right to practice law.

All of the letters that we have submitted and made exhibits to our sentencing memorandum indicate not only from colleagues, not only from members of his firm, but from adversaries, from insurance lawyers, from everybody who has encountered Cantor in the practice of his profession, nothing

but admiration, adulation, respect, and attestation to the fact that he was an excellent lawyer, ethical, trusted, and responsible.

Now, the likelihood of his losing his right to practice is real and immediate. And I say that, your Honor, because we have received, as has Mr. Cantor, a petition from the disciplinary authority with a motion to disbar Mr. Cantor automatically, returnable on October 15, before the Appellate Division, First Department. So that it's not just a question of somewhere in the future this will happen. This will happen very, very immediately, and it raises a question which I don't know whether the guidelines took into consideration.

Recognizing that Mr Cantor is 75, maybe some current wisdom is that maybe he should stop practicing law anyway. But nevertheless the effect is: What does a man 75 years of age who has all these physical impairments do when his profession that he's practiced for over 50 years is taken away from him?

I remember a case, Judge, and I apologize to your Honor, because I don't have the name of it in front of me, but the late Judge Broderick decided a case where a defendant had a business, and as a result of his conviction, he lost his business. And Judge Broderick considered that as a basis for downward departure. And, unfortunately, as I pass on in years, the name of the particular case alludes me and I didn't have the foresight this morning to go back into the office to dig it out. But I represent to you that such a case exists and, if need be, your Honor, I can submit it to the Court.

But it was not only in effect Judge Broderick in his wisdom who recognized the fact that there are collateral

consequences. The United States Supreme Court in Koon v. The United States – and you will hear a lot about it because obviously considering our two respective different positions, Mr. Dember at the first table and me at the second table, we have different views about what the Koon case says.

But nobody can dispute the fact Koon v. United States, 116 Supreme Court 2035, a 1996 case, clearly recognizes that there is a consideration concerning collateral consequences. And Koon case also suggested, and which I call to this Court's attention because I rely on it heavily, that even if an individual factor for downward departure may not exist, a combination of factors may be so compelling and may exist to authorize, permit, indeed induce the Court to downwardly depart.

As Koon case indicates clearly also, they referred to a situation which I would like to refer to, and that is they refer to the heartland under 2H1.4. And we submit to your Honor that this case falls without the heartland of bribery cases under 666, for a variety of reasons, many of which I will not go into because your Honor has kind of alluded to them in making your determination of a two-point downward departure.

But one I would be remiss in not reminding your Honor is that – and I've been doing this for more years than I care to admit – where after a verdict two jurors have found it necessary to communicate, one in public and one with the Court directly, indicating that in retrospect this is not their verdict, they don't think Mr. Cantor is guilty.

I'm not suggesting to your Honor that that warrants setting aside the verdict, I think I know better than that. But

what I'm suggesting to your Honor, most respectfully, to consider is: Does this suggest to us that this case at the very inception was outside the heartland of bribery cases under 666?

An additional aspect that we think takes this case out of the heartland is what we have referred to as the imperfect entrapment. Now, obviously Mr. Cantor did not take the witness stand and we didn't float in the classic sense a defense of entrapment. However, in considering it as a basis for downward departure, the cases – and there are a number of them that I will allude to – clearly indicate that it does exist as a concept.

Not only does it exist, but the courts have utilized it in cases of much greater and much more serious consequence than Mr. Cantor's situation. And it started out interestingly enough in inverse order in this particular district. It started out with a case decided by Judge Sweet, and that case was United States v. Giles.

In Giles, which was a money-laundering case which seriousness we certainly can't neglect, it indicated, and Judge Sweet downwardly departed, indicating – and by the way, Giles is reported at 768 F. Supp. 101-103 in the Southern District of New York in 1991 – indicating as one of the strong considerations that there is no prior history on the part of this particular defendant Giles to do money laundering and as a result of it in effect talked about a downward departure in that particular case. And he did it in sort of interesting language, in my judgment, your Honor, if you would just bear with me for a moment.

(Pause)

MR. NEWMAN: He said on page 103, "However, because it evolved, this case is indeed an unusual one. There is no evidence that indicates that Giles had had any prior history of money laundering and the fact that he was on welfare strongly suggests he has not."

Let me digress for a minute and see how it applies in my mind to the case at bar. Clearly Mr. Cantor had practiced construction law for well over 40 years. Clearly he had a respected position in that profession. Clearly, as was indicated by Mr. Walla, he had dealt with Mr. Cantor for over 20 years, with no suggestion of any impropriety on the part of Mr. Cantor.

A more interesting note for me is the fact that Mr. Rosenblum, albeit he was involved in corruption for a long period of time, testified on this witness stand there was no scintilla, no hint, no suggestion, from his testimony or from any question posed to him, that Mr. Cantor in any way prior to that request or initiation on the part of Mr. Rosenblum, that Mr. Cantor had ever engaged in this type of conduct before.

Now, we neglected in our memorandum, and I apprised Mr. Dember of it this morning and I apologize to the Court, to indicate to this Court that in 1991, the determination by Judge Sweet was affirmed in a memorandum opinion in the tables by the Second Circuit, so that the exigent law in the Second Circuit now permits, permits, a downward departure for what we call this imperfect entrapment defense.

The affirmation by the Second Circuit is reported in 953 F.2d 636 (2d Cir. 1991). This policy of recognizing the

imperfect entrapment defense was picked up in the Ninth Circuit initially in a case called United States v. Garza-Juarez, 992 F.2d 896 (9th Cir. 1993). And it's interesting, the Garza-Juarez case was a gun case, certainly a serious case in which a court recognized downward departure for an imperfect entrapment defense.

The Garza-Juarez case was then followed by the Ninth Circuit in a case called United States v. McClelland, and that's reported, if you will, at 72 F.3d 717 (9th Cir. 1995). On page 726 of that decision, the McClelland court emphasizes the legality and, if you will, the bona fides of a downward departure for imperfect entrapment even where in that case the defendant initiated the so-called illegal conduct.

I think it's without contradiction in this case as to how the conduct was initiated in this case. It wasn't by Mr. Cantor; it was by Mr. Rosenblum. And it was clear that Mr. Cantor, in endeavoring to collect what his clients were rightfully entitled to, attempted to follow all of the normal legitimate practices and, if you will – and maybe I'm being overly dramatic, but that's how I view it – he was thrust into the arms of Mr. Rosenblum.

When he wrote his letter, he, Mr. Cantor, was told, The guy you have to talk to is Rosenblum. And indeed Walla sent a copy of the letter to Mr. Cantor in which he indicated that the proper person to deal with was Rosenblum who had already at that point been caught with, to put it mildly, his hands in the cookie jar.

Even in the Giles case where it might be said that the defendant had more to do in initiating it, Judge Sweet and the

Second Circuit recognized the concept of imperfect entrapment as a basis for downward departure.

Certainly here, with Mr. Rosenblum being set up in a position of power, albeit, a convicted – not convicted at that point, but certainly an admitted felon, and placed in that position of power, and Mr. Cantor being thrust into his arms to deal with him in an endeavor to get what was rightfully due to certain of his clients, I think in the light of the cases that we have cited clearly spells out a situation for imperfect entrapment, and therefore another basis for a downward departure.

The factors we have cited both here orally and in greater detail in our sentencing memoranda certainly cry out for a combination of factors as the Koon case indicated, meriting a substantial downward departure.

I know there's a letter from the Bureau of Prisons by a manager – not a doctor, as I read his letter, but a manager – indicating and attesting to the great facilities at the Bureau of Prisons. And I'm not going to get into a debate, but one thing is for sure: Nobody has challenged the last paragraph of Dr. Rubinstein's statement, to the effect that "Mr. Cantor is a troubling patient with multiple symptom abnormalities and potential failures. I think it is quite likely, perhaps greater than 90 percent, that during a period of incarceration the patient would sustain a life-threatening or life-taking myocardial infarction. Kidney dialysis is also a very real possibility."

That can't be refuted and the suggestion by a manager of a Bureau of Prisons that, Don't worry about it, I have the facilities that can take care of this defendant, I'm not going to

argue with it, but I think it should just be given that kind of weight in the face of Dr. Rubinstein's unequivocal statement

Before I close, I would like to just call to the attention of this Court a couple of statements by the United States Supreme Court in Koon v. The United States, which I have previously cited. And I respectfully submit to you that sometimes as advocates – I know I do and perhaps Mr. Dember does from his position – might lose sight of these precepts because of our almost slavish attention to the Sentencing Guidelines.

One of them is contained on page 2044 of the Koon decision as reported in 116 S. Ct. 2035. And that statement reads, in discussing the factors that the Commission lists that should not be considered, the Court, in commenting on that list quotes the commission. And where the commission says that "With the exception of those listed factors, the commission does not intend to limit the kind of factors, whether or not mentioned anywhere else in the guidelines, that could constitute ground for departure in an unusual case," I say to you the case of United States v. Louis Cantor is such an unusual case.

The mere fact that it may not be mentioned or may fall within any guideline, specific guideline, and the combination of circumstances that exist here, permit this Court, in its discretion, to downwardly depart. And I think that precept is further embodied in Koon.

If the Court needed any further support for it, at page 2046 of the same decision, the United States Supreme Court said, "A district court's decision to depart from the guidelines, by contrast, will in most cases be due substantial deference,"

and I would like to highlight in the next phrase what we all sometimes lose sight of because of the guidelines "for it embodies the traditional exercise of discretion by a sentencing court."

This, I submit to the Court, is such an unusual case as indicated on 2044 of the Koon decision, and it's a case in which this Court should exercise its traditional power of discretion as indicated on 2046, by downwardly departing to either afford probation or house arrest in lieu of incarceration, for a person who is 75 years old, suffering clearly from a whole panoply of maladies and who has the background and the record of Louis Cantor.

Thank you, Judge

THE COURT: Thank you, Mr. Newman.

Mr. Dember. Ms. Bloom.

MR. DEMBER: Your Honor, we will simply rely on our letter of October 17.

THE COURT: Fair enough.

Is there any reason why sentence should not be imposed at this time?

MR. NEWMAN: No, your Honor.

MR. DEMBER: No, your Honor.

THE COURT: Quoting the Sentencing Guideline – this will take a minute or two, Mr Cantor. You do not really have to stand if you do not wish.

The same for you, Mr. Newman.

MR. NEWMAN: Thank you, sir.

THE COURT: Quoting Sentencing Guideline Section 5K2.0, which in turn quotes from 18, United States Code, Section 3553(b), the sentencing court may depart from the guideline range if, "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

The guidelines for these offenses, which is Section 2C1.1 of the guidelines, applied to "a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions."

The background discussion in the guidelines at that section refers to such typical bribes as those paid to obtain preferential treatment in the award of a government contract, or issuance of a license to which the recipient is not entitled, or to obstruct justice, or to facilitate the commission of another crime such as bribing a law enforcement officer to allow the smuggling of cocaine.

That approach does not and could not, given what the Sentencing Commission had to accomplish, adequately take into consideration the mitigating circumstances of this case. I

list a few sufficient to justify a departure downward from the guidelines sentencing range:

First, the purposes of the bribes were not to facilitate the commission of a crime or to obtain a license to which the recipient was not entitled. They were to obtain payment of moneys legitimately due to the claimants and long withheld in what one witness described as "a 15-year mess left by the Board of Education for lack of effort in closing out its contract obligations."

Second, the defendant did not pay a penny of the bribes. While he charged his client for his professional services, he did not share in the proceeds obtained by the bribes. His involvement was not out of greed or personal venality. Indeed, it was an anomaly in a lifetime of decent, honorable, and altruistic behavior. His introduction of his clients to Rosenblum, whom he knew had to be paid, was motivated by his conviction that they would not live to see the money they were entitled to unless they paid Rosenblum

Third, the bribery arrangement was not one into which the defendant entered eagerly, as the government argues. On the contrary, he complained that it was wrong, tried to distance himself from it, and was repeatedly told by Rosenblum that there was no workable alternative.

Rosenblum said there was too little money to satisfy all obligations, that only those at the head of the list would be paid, that litigation would be delayed for five or six years, and then appealed, if lost, and that the claimant could work with Rosenblum or fight with the Board of Education.

In view of his client Julius Shulman's advanced age and Mrs. Caristo's situation, 85 years old and running out of funds, those arguments were powerful. Rosenblum understood. He was extorting the bribes. There was testimony he pleaded guilty to extortion. Under New York's penal code, Section 200.5, it is a defense to a bribery prosecution that the corrupt public servant obtained the bribe by means of extortion.

These mitigating circumstances could not have been adequately considered by the Sentencing Commission in formulating its guidelines sentencing range, and they clearly indicate a downward departure. Accordingly, I do not need to advert to Mr. Cantor's age – 75 years – or the state of his health – he has suffered heart attacks, open heart surgery and angioplasty and has prostate and kidney trouble – as grounds for that departure.

On the case as a whole, I am departing downward to level 9, which, at Mr. Cantor's criminal history category of 1, yields a sentencing range of 4 to 10 months. Within that range, I am imposing sentence as follows:

Mr. Cantor, I am placing you on probation for a period of three years on the standard conditions of probation, and the additional special conditions that you undergo five months of home confinement and that you pay to the Treasurer of the United States a fine of $40,000. I also impose the $300 special assessment which is required by 18, United States Code, Section 3013.

Is there any reason why sentence should not be imposed as stated?

MR. DEMBER: No, your Honor.

MR. NEWMAN: No, your Honor.

THE COURT: Sentence is now imposed.

MR. NEWMAN: Your Honor, just one moment.

(Pause)

MR. NEWMAN: Your Honor, as I view the law on fines, Mr. Cantor has his home up for sale, as he indicated in the letter to your Honor. Therefore, under the law, interest would start running on the fine unless your Honor saw fit to allow the fine to be paid over the period of probation.

If he sells his house, he will pay it immediately. But probation can set up a series of payments which will then stop the running of interest on the fine, Judge. And just not to impose an additional financial burden on him, I would ask your Honor to consider Mr. Cantor working out with the probation department a series of payments during the period of probation and the added condition that upon sale of the house he immediately pays whatever balance is due.

THE COURT: Yes, it was my intention that it be paid out of those proceeds and so he can work that out with the probation office. The payments should be completed by the end of his period of probation, in any event.

MR. NEWMAN: Yes. Thank you, sir.

THE COURT: Mr. Dember.

MR. DEMBER: Just for housekeeping purposes, there were two earlier indictments that existed prior to the one that the defendant was tried under, the original indictment and the first superseder. At this time, your Honor, I move to dismiss those indictments.

THE COURT: So ordered.

MR. DEMBER: I would just ask your Honor to remind the defendant he certainly has a right to appeal.

THE COURT: Yes.

You have the right to appeal, Mr. Cantor, and if you wish to appeal, file a notice within ten days. Mr. Newman probably knows how to do that, but if you wish –

MR. NEWMAN: I would like to say I'm undefeated, Judge, but I do know how to do that.

THE COURT: The clerk of the court will do it on your behalf if you wish. If you cannot pay the cost of an appeal, you have the right to ask for leave to appeal without paying the cost.

MR. NEWMAN: Thank you, your Honor. I represent to the Court I will file a notice of appeal for Mr. Cantor.

THE DEFENDANT: May I speak now to thank your Honor.

THE COURT: Thank you, all.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

-against- S2 94 Cr. 465 (LLS)

LOUIS CANTOR,

Defendant.
----------x

MEMORANDUM and ORDER

The main points urged in support of defendant's motions under Fed.R.Cr.P. 29 and 33 for acquittal or a new trial are rejected, for the following reasons.

1.

The transactions for which Cantor's clients bribed Rosenblum involved things "of value of $5,000 or more." 18 U.S.C. §666(a)(2). Even if the Board of Education was withholding payment improperly, it possessed the money. Rosenblum's statements that the payments might never be made to the claimants started the process of his being bribed to expedite them. Although the Board of Education's continued retention of the funds may have been discreditable, its interest in them involved values vastly over $5,000. For illustration, if Manshul Construction Corporation had been able to bring a diversity action against the Board of

Education in federal court, no one could argue that the amount in controversy was under $50,000.

Oversimplifying somewhat, the amount involved does not depend on the legitimacy of the claim, but on its size. A stolen item may be of value to a thief, even if he has no right to keep it.

In the language of the statute, the bribes were paid in connection with transactions involving "things" (here, assets or obligations) of a value of $5,000 or more, whether the Board of Education was entitled to possession of those assets or not.

2.

The exception for "salary, wages, fees, or other compensation" §666(c) does not apply. The construction contracts are not analogous to employment, and the payments sought by Cantor's clients were not similar to wages or salary; they were large and complex claims, subject to audit, offsets, retainages and negotiation before payment. Thus, even if Cantor were correct that one should look at the payments to his clients, rather than the bribes his clients paid to Rosenblum, that would not save him.

3.

Not only was the evidence sufficient to establish that Cantor's clients' bribes were paid to influence one whom he thought was an agent of the Board of Education, but Rosenblum in fact was an employee of the Board, which paid him a salary and gave him an office and duties. He was also serving the investigators; he was disloyal and dishonest; he

was at risk of discharge if his employers learned the truth; but in the meantime he was an employee. Intending that he be bribed (accomplishing a lawful end by unlawful means) was corrupt, even if the clients were entitled to be paid.

* * *

Accordingly, the motions are denied.

So ordered.

DATED: New York, New York
September 20, 1996

/s/
LOUIS L. STANTON
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

-against- S2 94 Cr. 465 (LLS)

LOUIS CANTOR,

Defendant.
----------x

OPINION AND ORDER

The second superseding indictment charges defendant Louis Cantor with violations of 18 U.S.C. §666 and with conspiracy to violate that statute in violation of 18 U.S.C. §371.

Cantor seeks an order (1) dismissing the indictment because 18 U.S.C. §666 is unconstitutional under the Tenth Amendment, the Due Process Clause, and the Ex Post Facto Clause; (2) suppressing Cantor's statements to a government informant; (3) severing his trial on Counts Five and Six from that on Counts One through Four; (4) dismissing Count Four for lack of proper venue; and (5) directing the government to provide certain particulars.

Although he also moved to dismiss portions of the first superseding indictment for failure to allege an essential element of certain offenses charged, and certain counts

claimed to be multiplicitous, the second superseding indictment renders those motions moot. (Cantor Reply Mem. at 1.)

BACKGROUND

18 U.S.C. § 666 states, in pertinent part, that:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists –
>
> . . .
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribunal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.
>
> . . .

The six-count indictment states that Cantor, an attorney whose practice included the representation of construction industry clients who conduct business with the New York City Board of Education ("BOE"), (Indictment ¶3), violated that statute and 18 U.S.C. §371 when he facilitated his clients' bribery of a BOE official.

DISCUSSION

1. Tenth Amendment challenge to 18 U.S.C. §666

Cantor claims that 18 U.S.C. §666 is unconstitutional because Congress "did not make clear to the states the conditions for accepting federal funds", namely, "the federalization of almost all local conduct and officials". (Cantor Reply Mem. at 11). He also contends that because courts have concluded that §666 "neither explicitly nor implicitly requires that the $10,000 be directly linked to the program that was the subject of the bribe," United States v. Coyne, 4 F.3d 100, 109-10 (2d Cir.1993), cert. denied, 114 S. Ct. 929 (1994), the statute imposes a condition on states' receipt of federal funds which is unrelated to the federal interest protected by the statute. That condition is the imposition of federal criminal jurisdiction over what would otherwise be purely local bribery schemes.

The parties agree that Congress enacted 18 U.S.C. §666 pursuant to its spending power. Cantor Mem. at 33; Cantor Reply Mem. at 11; Second Gov't Mem. at 20; see U.S. Const. art. I, §8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ."). The Supreme Court has stated that

> Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."

South Dakota v. Dole, 483 U.S. 203, 206, 107 S. Ct. 2793, 2795-96 (1987) (quoting Fullilove v. Klutznick, 448 U.S. 448, 474, 100 S. Ct. 2758, 2772 (1980) (opinion of Burger, C.J.)). However, the spending power is "subject to several general restrictions": (1) the power must be used in pursuit of the general welfare, (2) "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation'", (3) "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs' ", and (4) restrictions imposed by other constitutional provisions. Dole, 483 U.S. at 207-08, 107 S. Ct. at 2796 (alteration in original) (citations omitted).

18 U.S.C. §666 does not impose a condition on the receipt of federal funds. The statute neither requires a state's compliance with federal regulatory or administrative directives, nor prevents state action. As stated by Judge Sotomayor in United States v. Fulton, S2 94 Cr. 285 (SS), 5/24/95 Tr. at 34-38 (S.D.N.Y.) (oral decision):

> Section 666 does not derogate any state right. Unlike the issues addressed in South Carolina v. Dole, 483 U.S. 203, or in New York v.

United States, 112 S.Ct. 2408, where the federal government was, in essence, coercing a state entity to do something that it might or might not choose to do in order to receive federal funds, Section 666 does not force the state government to do anything. Neither does it take away from the state government any powers to protect its own interest. The state can still pass any laws it wishes to control or penalize the conduct of its own officials. All Congress has done in Section 666 is to pass a law making the conduct of individuals, not the state, criminal. Hence, I do not believe that a Tenth Amendment argument is appropriate in this case, and I reject it.

Nor is the conduct prohibited by §666 so remote from the federal interest in protecting federal funds from the effects of local bribery schemes as to exceed the scope of Congressional spending power or to run afoul of the Tenth Amendment. But cf. United States v. Lopez, --- U.S. ---, 115 S.Ct. 1624 (1995).

Cantor's motion to dismiss the indictment on Tenth Amendment grounds is denied.

2. Ex post facto/due process challenge

Cantor contends that 18 U.S.C. §666 violates the Constitution's Ex Post Facto and Due Process Clauses because the statute's federal funding requirement can be satisfied if the entity receives at least $10,000 within the twelve-month period after the conduct. See 18 U.S.C.

§666(d)(5) ("the term 'in any one-year period' means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense"). He argues that the statute permits the government to manufacture federal criminal jurisdiction over participants in local bribery schemes after their conduct has occurred, simply by later transferring federal funds to the local entity connected with the bribe.

With limited exceptions not relevant here, see Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 93 S. Ct. 2908, 2915-16 (1973); Ada v. Guam Soc'y of Obstetricians and Gynecologists, 113 S. Ct. 633, 634 (1992) (Scalia, J., dissenting), "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S. Ct. 2908, 2915 (1973).

The second superseding indictment states that the New York City Board of Education ("BOE") received over $10,000 from the federal government in the twelve-month period before Cantor's offenses. (Indictment ¶¶6, 9, 15, 18, 24, 27.) Accordingly, no due process or ex post facto claim is presented by the facts of this case. Cantor's motion to dismiss the indictment on those grounds is denied.

3. Motion to suppress

Cantor moves to suppress his statements to Sheldon Rosenblum, a former attorney employed by the BOE. Cantor

claims that suppression is warranted because government attorneys violated Disciplinary Rule 1-103(A) of the Code of Professional Responsibility, which states (as adopted by the courts of New York):

> A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2), not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of section 1200.3 of this Part [DR 1-102] that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

N.Y. Comp. Codes R. & Regs. tit. 22, §1200.4 (alteration added); cf. N.Y. Judiciary Law app. DR 1-103 (McKinney 1992 & Supp.1995). DR 1-102 prohibits, inter alia, "conduct involving dishonesty, fraud, deceit, or misrepresentation." N.Y. Comp. Codes R. & Regs. tit. 22, §1200.3(a)(4); N.Y. Judiciary Law app. DR 1-102(A)(4) (McKinney 1992 & Supp.1995).

"The federal courts enforce professional responsibility standards pursuant to their general supervisory authority over members of the bar." United States v. Hammad, 858 F.2d 834, 837 (2d Cir.1988), reconsideration declined, 902 F.2d 1062, 1063-64 (2d Cir.), cert. denied, 498 U.S. 871, 111 S. Ct. 192 (1990). Although their authority includes the suppression of evidence obtained by federal prosecutors in violation of a disciplinary rule, Hammad, 858 F.2d at 840-42,

district courts should "exercise their discretion cautiously and with clear cognizance that suppression imposes a barrier between the finder of fact and the discovery of truth." Id. at 842.

"[I]n determining the scope of a particular disciplinary rule, we recognize that the rules of ethics are not statutes, but standards of conduct. Accordingly, although 'plain meaning' or 'intent of the drafters' interpretive standards are appropriate when the disciplinary rule in question is unambiguous, where . . . neither the plain meaning nor the intent of the drafters can be discerned from the face of the rule, matters of policy are appropriately considered in determining its scope." Grievance Committee v. Simels, 48 F.3d 640, 645 (2d Cir.1995). Neither the text of DR 1-103 nor the corresponding Ethical Considerations specifies a time period within which reporting is required. See N.Y. Comp. Codes R. & Regs. tit. 22, §1200.4; N.Y. Judiciary Law app. EC 1-2 & EC 1-4 (McKinney 1992 & Supp.1995). In order to further the purposes of the Rule, namely, to protect the public and the profession from the actions of unscrupulous attorneys, see, e.g., N.Y. Judiciary Law app. EC 1-1, EC 1-2, EC 1-4, EC 1-5 (McKinney 1992 & Supp.1995), Hammad, 858 F.2d at 839 ("The Code is designed to safeguard the integrity of the profession and preserve public confidence in our system of justice"), DR 1-103 must be read to require reporting to an appropriate authority within a reasonable time under the circumstances.

Under the circumstances of this case, the government's use of Rosenblum does not require suppression of Cantor's statements. Although there is an important state interest in the regulation of attorneys practicing within its borders, there is a competing federal interest in the

enforcement of federal criminal law. "If a particular interpretation of a state ethics rule is inconsistent with or antithetical to federal interests, a federal court interpreting that rule must do so in a way that balances the varying federal interests at stake." Simels, 48 F.3d at 646 (emphasis in original). The state interest furthered by immediate disclosure of Rosenblum's unethical conduct is antithetical to federal interests to whatever extent it might jeopardize the federal criminal investigation. Balancing those competing interests, under the circumstances in this case, Cantor's statements will not be suppressed.

Accordingly, Cantor's motion to suppress is denied.

4. Severance of Counts Five and Six

Fed.R.Crim.P. 8(a) states that "Two or more offenses may be charged in the same indictment or information . . . if the offenses charged . . . are of the same or similar character or are based . . . on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

The three bribery schemes alleged in the indictment are similar, as are Cantor's alleged roles in them. As counsel for his co-conspirators, each of whom sought to influence the BOE in relation to some transaction they had with it, Cantor introduced each co-conspirator to Rosenblum, to whom each co- conspirator paid bribes. Moreover, the three contemporaneous schemes charged in the indictment were part of a common plan by Cantor to further his clients' business objectives in their dealings with the BOE through the facilitation of bribes to a particular BOE official:

Rosenblum. Accordingly, Counts Five and Six are appropriately joined under Fed.R.Crim.P. 8(a).

Although joinder of multiple offenses in a single trial often risks some prejudice to the defendant, Rule 8(a) "reflects a policy determination that gains in trial efficiency outweigh the recognized prejudice that accrues to the accused." United States v. Turoff, 853 F.2d 1037, 1042, 1043 (2d Cir.1988); United States v. Amato, 15 F.3d 230, 237 (2d Cir.1994); United States v. Werner, 620 F.2d 922, 929 (2d Cir.1980); United States v. Alverado, 92 Cr. 728 (LMM), 1994 WL 669968, at *2-3 (S.D.N.Y. Nov. 30, 1994). Thus, "a defendant who seeks separate trials under Rule 14 carries a heavy burden of showing that joinder will result in 'substantial prejudice.'" Amato, 15 F.3d at 237 (citation omitted).

Cantor has not carried that burden. He claims that because Counts Five and Six relate to a "classic" bribery scheme, while the conduct alleged in Counts One through Four is "not obviously corrupt", (Cantor Mem. at 50), and because there is a "substantial overlap in time and participants" among the various bribery schemes, (Cantor Mem. at 53), there is a substantial risk that the jury will confuse the various counts and convict him based on an impermissible cumulation of evidence. (Cantor Mem. at 54.)

But in fact the schemes charged in the indictment are not so complex, nor are there so many participants, that an appropriately charged jury will have difficulty considering each count on its merits. The motion for severance under Fed.R.Crim.P. 14 is denied. See United States v. Cervone, 907 F.2d 332, 341 (2d Cir.1990) ("A motion under the rule [Fed.R.Crim.P. 14] is committed to the sound discretion of

the trial court and is 'virtually unreviewable.' It is thus not sufficient to show a likelihood that a separate trial would have benefitted the defendant. Rather, there must have been prejudice so substantial as to amount to a 'miscarriage of justice'") (alteration added, citations omitted); Alverado, 1994 WL 669968, at *3 (substantial prejudice standard "not met by simply showing that the defendant would have had a better chance of acquittal at a separate trial").

5. Venue

Cantor seeks dismissal of Count Four, claiming that venue is improper in the Southern District of New York. He argues that because the bribe alleged in that count was offered and given by a third party (Cantor's client) in Brooklyn and Queens, (see Gov't Mem. Ex. 2 at ¶¶16-20, 23, 26), venue for the substantive offense is not proper here.

Count Four charges Cantor with a violation of 18 U.S.C. §§2 and 666. One charged as an accessory may be tried where he committed accessorial acts. See United States v. Bozza, 365 F.2d 206, 221 (2d Cir.1966) ("This court held in Gillette that 18 U.S.C. §2 . . . 'does not supersede the common law rule of venue but provides an additional venue'"; "Congress seems to have been content with venue where the defendant's own accessorial acts were committed or where the crime occurred . . ."); United States v. Gillette, 189 F.2d 449, 451-52 (2d Cir.) ("Since Gillette neither transported the checks nor was present at their transportation, by the common law rule as we inherited it he would be triable only as an accessory, and only in the district where the accessorial acts took place. The statute cited in note 1 [18 U.S.C. §2] makes an accessory a principal so that it is now possible to try him where the substantive offense was committed. But

this, in our opinion, does not supersede the common law rule of venue but provides an additional venue") (alteration added) (footnotes omitted), cert. denied, 342 U.S. 827, 72 S. Ct. 49 (1951); United States v. McCulley, 673 F.2d 346, 350-51 (11th Cir.), cert. denied, 459 U.S. 852, 103 S.Ct. 116 (1982); United States v. Sweig, 316 F.Supp. 1148, 1161 (S.D.N.Y.1970); United States v. Branham, Crim. No. 86-63-JRR, 1987 WL 12252, at *8 (D. Del. June 5, 1987); see also United States v. Delia, 944 F.2d 1010, 1014 (2d Cir.1991). But see United States v. Walden, 464 F.2d 1015 (4th Cir.1972).

The government's offer of proof on the issue of venue, supported by a sworn complaint, includes the allegation that on March 24, 1992, Cantor met with Rosenblum in Cantor's Manhattan offices. At that meeting, Cantor and Rosenblum discussed the method by which the balance of the bribe would be paid to Rosenblum by John Brunetti, a principal of one of Cantor's clients. (See Gov't Mem. Ex. 2 at ¶¶21-22; Second Gov't Mem. at 4.) Because that accessorial act, if proven at trial, establishes venue in this district, Cantor's motion to dismiss Count Four on those grounds is denied. See United States v. Rogers, No. 90 Cr. 377 (CSH), 1991 WL 90797, at *3 (S.D.N.Y. May 21, 1991) ("In considering a motion to dismiss an indictment the district court must take as true all of the allegations contained in the indictment. The district court can consider additional documents that have been submitted but cannot give any weight to contrary factual assertions made by the defendant"); United States v. Castellano, 610 F.Supp. 1359, 1388-89 (S.D.N.Y.1985) ("At this stage of the proceedings, however, the government need only allege, with sufficient specificity, that venue is appropriate by reason of the commission of the charged acts in the Southern District.

Where the indictment is insufficient on its face, moreover, the government may meet this burden either by amending the indictment to reflect the commission of the charged acts in the Southern District, or through a sworn bill of particulars") (citation omitted).

6. Request for further particulars

Cantor seeks further particulars concerning federal funding received by the BOE in the twelve-month period before Cantor's alleged offenses.

"'A bill of particulars should be required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused.'" United States v. Torres, 901 F.2d 205, 234 (2d Cir.) (quoting United States v. Feola, 651 F. Supp. 1068, 1132 (S.D.N.Y.1987), aff'd, 875 F.2d 857 (2d Cir.1989)), cert. denied sub nom. Cruz v. United States, 498 U.S. 906, 111 S.Ct. 273 (1990).

The government is directed to identify the federal programs under which the BOE is claimed to have received benefits in excess of $10,000, the amount of the benefits received by the BOE, and the dates on which those benefits were received by the BOE. That will sufficiently inform Cantor of the charges against him to enable him to prepare a defense, to avoid surprise at trial, and to enable him to interpose a plea of double jeopardy if necessary. See Torres, 901 F.2d at 234; United States v. Davidoff, 845 F.2d 1151, 1154 (2d Cir.1988); United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir.1987). Accordingly, his requests for other particulars are denied except as noted above.

CONCLUSION

Cantor's request for additional particulars concerning the federal funds received by the BOE is granted to the extent stated above. The motions are otherwise denied.

So ordered.

Dated: New York, New York
August 18, 1995

/s/
LOUIS L. STANTON
U.S.D.J.

APPENDIX E

§ 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists–

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof–

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that–

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section–

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department,

independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.